Frontier Foundries, Inc. ***and*** **William Resinger** ***and*** **Ronald J. Grazier, Jr.** Cases 6–CA–24355 and 6–CA–24499

September 13, 1993

ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On June 23, 1992, the Regional Director for Region 6 issued a consolidated complaint and notice of hearing alleging, inter alia, that the Respondent violated Section 8(a)(1) and (3) of the Act by selecting Charging Parties William Resinger and Ronald J. Grazier, Jr. for layoff based on their activities on behalf of United Steelworkers of America. A hearing was held before Administrative Law Judge Michael O. Miller on September 23 and 24, 1992, and, after adjournment, was scheduled to resume on November 2, 1992. At the request of the Respondent the hearing was continued until December 12, 1992. On December 11, 1992, the hearing was postponed indefinitely pending settlement.

On March 12, 1992, the Respondent submitted an executed non-Board settlement to the judge, the terms of which provided as follows:

> Charging Party Resinger received $2000 ($468 treated as regular backpay subject to the standard payroll deductions; the remainder, $1532, was treated as ''liquidated damages'' not subject to taxation).
>
> Charging Party Grazier received $1000 ($476 treated as backpay subject to payroll deductions; $524 treated as ''liquidated damages'' not subject to taxation).

In both cases the liquidated damage were purportedly for ''personal injury . . . suffered'' because of the layoff and in consideration of a general release. The settlement agreement specifically provided that the sums denominated as ''liquidated damages shall have no deductions taken from them and that any tax consequences are the responsibility of the alleged discriminatees. The General Counsel filed an ''Opposition to Approval of Withdrawal Requests and Dismissal of Complaint'' and objected to the proposed non-Board settlement.

On April 12, 1993, Judge Miller issued an ''Order Approving Settlement and Request to Withdraw Charges and Dismissing Complaint.'' In his order Judge Miller noted that the settlement provided that the discriminatee ''would be solely responsible for determining the tax consequences, if any, stemming from the receipt'' of the liquidated damages, that the Charging Parties withdrew their charges with prejudice, and that since the hearing adjourned, the Respondent and the Union had engaged in negotiations, and the Union had not objected to the settlement.

On April 26, 1993, the General Counsel filed a Request for Special Permission to Appeal From Ruling of Administrative Law Judge and Appeal.[1] The General Counsel opposes the settlement. The primary basis for his doing so is his contention that the parties have improperly characterized, as liquidated damages, a substantial portion of the settlement amount. According to the General Counsel, the parties did so in order to ''avoid the payment of taxes on backpay.'' The General Counsel also argues that if the parties have correctly characterized the amount of liquidated damages, then the amount attributable to backpay is ''unconscionably small'' and thus can not pass muster under *Independent Stave*, 287 NLRB 740 (1987).

We agree with the General Counsel's second contention, and we do not pass on the primary contention. That is, we accept arguendo the private parties' representation that Resinger is to receive $468 as backpay and $1532 as liquidated damages; Grazier is to receive $476 as backpay and $524 as liquidated damages. Because the Board awards only backpay and does not award ''liquidated damages,'' it follows that only $944 is being awarded to remedy the alleged unfair labor practices directed toward these two employees. According to the General Counsel, 100 percent of backpay for these two employees would be more than $15,000.

In deciding whether to accept a settlement agreement, the Board considers the following factors:[2]

> (1) whether the charging party[ies], the respondent[s], and any of the individual discriminatee[s] have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

[1] By an unpublished Board Order dated May 28, 1993, the Board, Member Devaney dissenting, granted the General Counsel's request for special permission to appeal, reversed the judge's order, reinstated the complaint, and remanded the proceeding to Judge Miller for appropriate action without prejudice to further settlement negotiations. The parties were advised that a fully articulated decision would follow.

[2] *Independent Stave*, supra at 74.

With respect to the first factor, we note that, although the charging parties and Respondent have agreed to the settlement, the General Counsel vigorously opposes it. With respect to the second factor, we note the serious nature of an 8(a)(3) violation, and we note that the usual remedy for that kind of violation includes full backpay. Significantly, the backpay award in this case is about 6 percent of full backpay. In addition, the settlement does not provide for any notices and does not contain assurances against future misconduct.

Of course, we recognize that there are risks (for both sides) in any litigation. However, particularly in light of the very small percentage of backpay awarded in the settlement, we are not persuaded that the General Counsel's chances of success are so abysmally low that it would be reasonable to accept a 6 percent settlement

Concededly, the other two factors to be considered under *Independent Stave* have not been shown to militate against acceptance. However, particularly because the settlement amount is so clearly unreasonable, and in light of the General Counsel's oposition, we shall not accept the settlement.[3]

MEMBER DEVANEY, dissenting.

I would affirm the administrative law judge's acceptance of the settlement agreement which was agreed to by the Respondent and the alleged discriminatees.

[3] See *NLRB v. Electrical Workers Local 112 (Fischbach Lord Electric)*, 143 LRRM 2256, 2257–2258 (9th Cir. 1993).